No. 3669

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOSEPH ROSENTHAL,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

PETITION FOR A RE-HEARING ON BEHALF OF DEFENDANT IN ERROR

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To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The defendant in error, the United States, respectfully petitions the United States Circuit Court of Appeals of the Ninth Circuit for a rehearing of the above-entitled cause, following the judgment and opinion filed therein on December 5, 1921, whereby the judgment of the United States District Court

for the Northern Division of the Northern District of California was reversed; and in that behalf we respectfully ask and urge that further consideration should be given to that certain proposition of law declared in the opinion, to wit, that the two findings in the verdict respecting the two separate counts of the indictment "were thus wholly inconsistent and conflicting."

And especially are we lead to urge upon the Court this reconsideration, for the reason that we find ourselves unadvised as to what would be the proper performance of our official duty in the premises respecting the future consideration of this case. The Court remands the cause for a new trial; it has not directed that there be a dismissal. Yet, however cogent the proof of guilt may be which we would be able to lay before the jury in a new trial, any verdict in such trial in favor of the Government would be equally inconsistent and repugnant to the former verdict on the first count, if it is to be taken as settled that the former verdict on the second count presented such inconsistency and repugnance.

1. THE VERDICT ON THE SECOND COUNT WAS NOT INCONSISTENT WITH, OR REPUGNANT TO, THE VERDICT ON THE FIRST COUNT.

The prosecution was based upon a portion of the Act of February 13, 1913 (c. 50, Sec. 1, 37 Stat. 670), which provides that whoever "shall *buy,* or *receive,* or *have in* his *possession* any such goods or

chattels, knowing the same to have been stolen" shall be punishable; the goods so referred to are interstate shipments of freight or express. It thus appears that the crimes denounced contain certain several elements, to wit, the common element of goods stolen from interstate commerce, the common element of knowledge of their being stolen and, as a final element, any one of three separate acts stated in the disjunctive, to wit, that the party charged shall *buy,* or *receive.* or have *in* his *possession,* the goods. Each phrase of the statute, under familiar rule, is to be given effect and meaning. As was well said in the Burton case (*Burton v. U. S.,* 50 L. ed. 1057, 1069),

> "Congress intended to place its condemnation upon each distinct, separate part of every transaction coming within the mischiefs intended to be reached and remedied. Therefore an agreement to receive compensation was made an offense. So the receiving of compensation in violation of the statute, whether pursuant to a previous agreement or not, was made another and separate offense."

And so an accused party may have violated the statute in question here in three several modes: He may *buy* with guilty knowledge, or, failing that, he may *receive* with guilty knowledge; or, having "received" but without guilty knowledge he may subsequently have *in* his *possession* with the necessary guilty knowledge any such goods. The statute is so framed that one can not hold *in his possession* knowingly stolen goods with impunity simply because he

may be able to show that his guilty knowledge came to him after he had *received* the goods.

Now in the case at bar, the first count of the indictment charged a *buying* and *receiving* with guilty knowledge. The second count was framed upon the theory of a possible failure on the part of the Government in being able to show that such acts were with contemporaneous guilty knowledge and therefore, in the second count, the third element—the holding of the goods *in possession* with guilty knowledge—was charged. The verdict of the jury on the second count is its declaration that it found sufficient evidence to show that the defendant held the goods *in his* possession *at* a *time* when he had guilty knowledge of their being stolen.

The Court cites as the authority for its holding on this point the case of *Morgan v. Devine,* 237 U. S. 632, 639, 640. But, with deference, we are unable to appreciate how the authority in any manner sustains the ruling; for, as we read the case, the holding is to the contrary. The judgment of the Court in that case was that the verdicts were not inconsistent; the petition for a writ of habeas corpus was directed to be dismissed. The Court quoted with approval the holding in the Burton case, cited above, and declared

> "that the test of identity of offenses is whether the same evidence is required to sustain them; if not, then the fact that both charges relate to and *grow out of one transaction* does

not make a single offense where two are defined by statutes."

The case of *Gavieres v. U. S.*, 220 U. S. 338, 55 L. ed. 489, cited in the Morgan case as an authority for the holding, was another instance where the Court refused to hold a verdict of a conviction or acquittal a bar to a subsequent conviction upon an indictment charging a different offense, although both indictments were based upon the same words and acts, it being shown that one indictment contained a different element from the other, and the Court quoted with approval from the case of *Morey v. Commonwealth*, 108 Mass. 433, as follows:

> "A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other."

So in the case of the second count of the indictment here, the element of the *purchase* or *initial receipt* of the goods *coupled* with guilty knowledge on the defendant's part was not necessary to a conviction for a subsequent holding in possession coupled with a guilty knowledge later acquired. For it must be borne in mind that, while it may be urged that one who receives goods necessarily takes them into his possession, yet the two conceptions are by no means identical, and the Congress was well advised in enacting them as separate elements of the proposed crime. For while the holding

in possession is continuous, the receipt of the goods is not a continuous act, and if the receipt only were denounced, a guilty defendant could frequently escape by the pretense that his guilty knowledge, if any, was acquired later during his holding in possession. Thus the two elements are distinct, both in law and in logic, and it can not be said that a verdict is inconsistent which finds that the initial receipt was innocent but a subsequent holding of the goods was criminal.

The case of *Morgan v. Devine,* as well as the sections of Bishop on Criminal Law quoted in the opinion in the case at bar, were given consideration by the Circuit Court of Appeals of the Sixth Circuit in the case of

Kelly v. United States, 258, Fed. 392, 398.

In that case it was held that the verdicts in question were not inconsistent. Similar rulings were made in the cases of

Hinkhouse v. United States, 266, Fed. 977, 978,

Huffman v. United States, 259 Fed. 35.

In the former case this Court held that under given circumstances the verdicts were not inconsistent, and pointed out that in the first count there was contained an element which in no wise entered into the offense charged in the second count.

And in the Huffman case, by a divided Court, it was held that the verdicts were not inconsistent;

while in the dissenting opinion, pains were taken by the writer to show that the variation in language between the two counts was unsubstantial and that the first count, upon which the conviction was had, did not contain any *substantial element* not contained in the others. But here we have in the second count an additional element—the holding of the goods in possession after a later acquired guilty knowledge.

2. THE VERDICT WAS SUSTAINED BY THE EVIDENCE.

It may be urged that the jury's verdict was illogical, that the defendant should have been found guilty on both counts or neither, or that if the jury believed that he subsequently retained possession with guilty knowledge, they should have believed that he also received with guilty knowledge. But, as was well said by Judge Dickinson of the United States District Court of the Eastern District of Pennsylvania, in referring to a similar claim, "mere formal logical consistency is not one of the crown jewels of juries, and happily so" (272 Fed. 505).

We do not here discuss the question of sufficiency of the evidence to justify the verdict on the second count, for the reason that as the Court states in its opinion, "there was ample evidence given to sustain the verdict of guilty against the plaintiff in error under the second count." And as we have pointed out in the opening of this discussion, if it had been a mere case of the insufficiency of evidence, we

might endeavor to reinforce the Government's case on a new trial; but if we are to be confronted under the principle of the "law of the case" with the holding of this Court that the verdicts were necessarily inconsistent, we could not hope to have any favorable result on a new trial.

We therefore urge that this Honorable Court should order a rehearing of this case for the reasons hereinabove set forth.

Dated: December 30, 1921.

Respectfully submitted,

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T. J. SHERIDAN,
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Attorneys for Defendant in Error.

CERTIFICATE OF COUNSEL.

We hereby certify that we are counsel for Defendant in Error and petitioners in the above entitled cause, and that in our opinion the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

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